IN THE SUPREME COURT OF IOWA

ROBERT F. COLWELL, JR., D.D.S.,	)	SUPREME CT. NO. 20-0545
Plaintiff-Appellee,	)	
v.	)	
MCNA INSURANCE COMPANY and MANAGED CARE OF NORTH AMERICA, INC., D/B/A MCNA DENTAL AND MCNA DENTAL PLANS,	)	
Defendants-Appellants	)	

APPEAL FROM THE DISTRICT COURT
FOR POTTAWATTAMIE COUNTY, IOWA
HON. JAMES HECKERMAN, Judge

APPELLANTS' FINAL REPLY BRIEF

Anne M. Breitkreutz, AT0001103
Rodney C. Dahlquist, Jr., NE Bar #23912
Dornan, Troia, Howard, Breitkreutz & Conway PC, LLO
1403 Farnam Street, Suite 232
Omaha, Nebraska 68102
Ph.: (402) 884-7044
Fax: (402) 884-7045
Abreit@dltlawyers.com
Rodney@dltlawyers.com
Attorneys for Defendants-Appellants

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III. WHETHER MCNA's NETWORK OF GENERAL DENTISTS WAS ADEQUATE, THEREBY PERMITTING NONRENEWAL OF COLWELL'S PROVIDER AGREEMENT.

None.

IV. WHETHER MCNA's CONTRACT WITH THE STATE OF IOWA MANDATES PERPETUAL RENEWAL OF COLWELL'S PROVIDER CONTRACT.

None.

V. WHETHER THE PROVIDER CONTRACT BETWEEN MCNA AND COLWELL MANDATES PERPETUAL RENEWAL.

None.

VI. WHETHER THE NOTICE OF NONRENEWAL GIVEN BY MCNA TO COLWELL WAS A BREACH OF THE PROVIDER CONTRACT.

None.

ARGUMENT

Colwell invites this Court to expand federal law well beyond its current limit, and to apply the choice of provider law to a dentist who is a provider in a managed care network, a novel ruling. This Court should apply established federal law and reject that proposal.

This Court should likewise find that Iowa Code 249N, and the applicable Iowa Administrative Code, do not mandate MCNA to renew Cowell's Provider Contract year over year. Once its network is sufficient to meet the needs of its members, Iowa law permits MCNA to elect not to renew Colwell's Provider Contract.

Because neither the agreement between the State of Iowa and MCNA, nor Colwell's Provider Contract itself, mandate renewal, MCNA was free to exercise the option to non-renew Colwell's Provider Contract. Consequently,

MCNA's notice of nonrenewal of Colwell's Provider Contract was valid, and this Court should find that it was effective.

I. The authority cited by Colwell confirms that the District Court erred in applying a federal family planning "Any Willing Provider" Rule to a dentist.

Colwell's brief makes the case for MCNA's argument that 42 U.S.C. § 1396a(a)(23) and associated federal authority simply do not apply. All cited authority applies exclusively to a family planning provider, which is inapplicable in the present case. (Appellee's Brief, pp. 55-60). Because there is no federal statute, regulation or case that applies the federal "free-choice-of-provider" rule to a dentist, such as Colwell, this Court should reverse that portion of the District Court's Order.

Colwell directs this Court's attention to only one phrase of 42 U.S.C. § 1396a(a)(23) regarding "any individual eligible for medical assistance", (Appellee Brief, p. 59), but ignores the balance of the statute. He fails to

address the material qualification that the free choice of provider requirement in 42 USC § 1396a(a)(23) is limited to "family planning services" only for a managed care entity.

References by Colwell to the Code of Federal Regulations only confirm its inapplicability. 42 CFR § 431.15(b)(2) states that "[a] beneficiary enrolled in a primary care case-management system, a Medicaid MCO, or other similar entity will not be restricted in freedom of choice of providers of *family planning services*." [emphasis added]. Quite opposite of Colwell's argument, federal authority does not require MCNA to include more providers in its network "beyond the number necessary to meet the needs of its enrollees", and MCNA is free to implement "measures that are designed to…control costs and are consistent with its responsibilities to enrollees." See 42 CFR § 438.12(b)(1) and (3); see also 441 IAC 73.8(2) (mirroring the federal family provider rules).

Colwell continues to direct this Court to Medicaid guidance SMD #16-005. But just as the CFRs fail to assist

his position, this SMD is likewise unhelpful. One, it does not address the present factual scenario of a contract between a dental provider and a managed care entity and, two, it was subsequently rescinded by SMD #18-003 out of concern for being too limiting for the States. See https://www.hhs.gov/guidance/sites /default /files/hhs-guidance-documents/smd18003_1.pdf.

Finally, the cases cited by Colwell are inapplicable. First, these cases are inapplicable as they address a State's termination of a provider from the Medicaid program. See Planned Parenthood of Kansas v. Anderson, 882 F.3d 1205 (10th Cir. 2018) (examining the termination of provider from Medicaid program by State of Kansas, not MCO); PPGC v. Gee, 862 F.3d 445 (5th Cir. 2017) (termination from Medicaid program by the State of Louisiana); Daub v. New Hampshire DHHS, 97 A.3d 241 (N.H. 2014) (termination from Medicaid program by the State of New Hampshire); Planned Parenthood Arizona, Inc. v. Betlach, 727 F.3d 960 (9th Cir. 2013) (limitation on family planning providers by Arizona statute). The courts

in these cases were not examining a provider contract with an MCO, which is the basis of this litigation, so the exception relating to an MCO contained in 42 U.S.C. § 1396a(a)(23) was not at issue. In short, Colwell is not being terminated or nonrenewed from the Medicaid program by the State of Iowa, so these cases do not apply.

Second, the providers at issue in these cases are not dentists. Rather, they are family planning providers, which have another layer of protection that other types of providers, such as a dental provider, are not granted. Planned Parenthood Arizona, Inc. v. Betlach, 727 F.3d 960, 964 (9th Cir. 2013) (discussing choice of provider statute). It is telling that, despite pages of argument, Colwell can cite to no applicable authority or caselaw to support his position that federal law precludes nonrenewal of a dental provider contract with a managed care organization.

In sum, federal law does not impose on managed care entities a mandate to include any provider that is "qualified" and "willing", except in the context of family

planning services. Because this case involves MCNA, a managed care entity providing Medicaid dental services to the State of Iowa, (Appendix v. I, pp. 8-10, 224, 325 (Tr. 137:14-19); Appendix v. II, pp. 194-375), and Colwell, an Iowa-licensed dentist, (Appendix v. I, pp. 8, 10, 224, 274 (Tr. 6:1-2)), federal law does not prevent nonrenewal of his Provider Contract.

II. Iowa Code 249N.6(1), read in conjunction with the applicable IAC, is not categorical or unbounded.

The argument that the Iowa Any Willing Provider statute, Iowa Code 249N.6(1), can be read as a stand-alone statute is incorrect. (Appellee Brief, pp. 45-55). Colwell sidesteps relevant definitions and qualifications to a statute, while attempting to manufacture a nonexistent conflict between the Code, the Administrative Code and the State Contract. This Court should reject Colwell's advocacy for an unreasonable reading of Iowa Code 249N.6(1), and adopt the "limited" AWP Rule.

First, Colwell ignores the applicable statutory definition, and asks this Court to render such definition meaningless. Iowa Code 249N.6(1) provides that "[t]he Iowa health and wellness plan provider network shall include all providers enrolled in the medical assistance program and all participating accountable care organizations." "'*Iowa health and wellness plan provider network*' means the health care delivery network approved **by the department** for Iowa health and wellness plan members." Iowa Code 249N.2(13) (emphasis added). "'*Department*' means the department of human services." Iowa Code 249N.2(4).

If there was no distinction between the network managed and approved by the Department, and the network managed and approved by MCNA, then the definitions would be meaningless. Attempting to argue, as Colwell does, that the distinction means nothing ignores the reality that the Department operates an agency-maintained dental provider network for children and certain adults, and MCNA operates a separate network of

dental providers who treat all other adult Medicaid beneficiaries. Appendix v. II, pp. 221-222; Appendix v. I, pp. 276 (Tr. 8:2-8), 327-328 (Tr. 141:16-142:2); 381 (Tr. 221:5-15); 384-385 (Tr. 224:20-225:12).

Colwell's argument means that the definition of '*Iowa health and wellness plan provider network*' becomes particularly duplicative and unnecessary, contrary to the rules of statutory construction. See *e.g.* State v. Coleman, 907 N.W.2d 124, 137 (Iowa 2018) ("Through the *in pari materia* interpretation, we necessarily operate on the objective assumption that the legislature strives to create a symmetrical and harmonious system of laws"); TLC Home Health Care, L.L.C. v. Iowa Dept. of Human Services, 638 N.W.2d 708, 713 (Iowa 2002) (Court should "give effect, if possible, to every clause and word of a statute"). The definitions clearly intended to draw a distinction between the State-run provider network and a network managed by an MCO.

While prominent in Colwell's brief, the Informational Letter from the State does not provide any additional

guidance. Appendix v. II, p. 190. The letter merely references Iowa Code 249N, but it does not clarify, define or even discuss the scope or application of the AWP Rule. A glancing reference is unhelpful and irrelevant. (Appellee's Brief, pp. 47-48, 51, 54).

Colwell asks this Court to adopt a construction that would render definitions meaningless, while contemporaneously arguing that the removal of relevant language from the IAC has no meaning itself. (Appellee Brief, p. 50). He argues that the removal of language from the IAC was merely to eliminate references to "accountable care organizations," but a quick overview of the amendments readily refutes this argument.

Prior to 2016, 441 IAC 74.12(1)(b) stated that the "Iowa wellness plan provider network shall include all providers enrolled in the medical assistance program, including all participating accountable care organizations." Appendix v. II, pp. 872, 879. The changes in ARC 2361 were made to, among other things, "[a]dd the managed care organizations' role or responsibility in

delivery and payment of Medicaid-covered services" and to "[r]emove references to accountable care organizations." Appendix v. II, p. 832.

As part of these changes, 74.1 was revised to remove the definition of "accountable care organization" and add the definition of "managed care organization". Appendix v. II, p. 836. Notably, the version of 441 IAC 74.12(1)(b) then in effect was removed *in total*. If the intent was to subject managed care organizations to the same AWP Rule, the entire subsection would not have been removed. Rather, the newly-defined term "managed care organization" could have been simply inserted into 74.12. Alternatively, the last phrase referencing accountable care could have been stricken, leaving the following: "Iowa wellness plan provider network shall include all providers enrolled in the medical assistance program." But because the AWP Rule in 74.12(1)(b) was removed in total, and not simply a substitution of defined terms, managed care is not subject to this rule.

This does not, as Colwell contends, set up a conflict between Iowa Code 249N, 441 IAC and/or the State Contract. (Appellee Brief, p. 52). The code provides that "[t]he Iowa health and wellness plan provider network shall include all providers enrolled in the medical assistance program and all participating accountable care organizations." Iowa Code 249N.6(1). As noted above, the definitions limit application of this section to the State's provider network, leaving MCNA exempt from the "any willing provider" rule in 249N, except as required by the State Contract. Reference to "managed care" is absent in the definitions, although other parts of the Code specifically reference the same. See *e.g.* Iowa Code 514C.13(1)(g), 249A.15(2) (distinguishing between "fee-for-service" and "managed care" payments). If the drafters intended managed care to be subject to 249N.6, they could have clearly included managed care within the definitions.

Multiple references to cases involving the State, such as Brakke v. Iowa Dept. of Natural Resources, 897 N.W.2d 522 (2017) and the like, are inapplicable. (Appellee Brief,

pp. 52-53). This case does not involve DHS, or an appeal from DHS' interpretation of its rule; rather, this case involves a private MCO and a dentist. And while the cases stand correctly for the proposition that a statute will prevail over an administrative rule or contract provision, there is no conflict in this case. Because Iowa Code 249N.6 limits its applicability to the Department, the relevant IAC and State Contract merely supplement this code section. Appendix v. II, p. 797; 441 IAC 73, Preamble (managed care to deliver services pursuant to regulations and State Contract); Appendix v. II, p. 222-223 sections 1.3(E.1.03, E.1.04, ES.1.01 and E.3.07).

Colwell compares apples to oranges in an attempt to argue MCNA, a private company, must comply with the obligations imposed on the Iowa Department of Human Services. This is simply not the case. The AWP Rule in 249N is applicable to the network operated by the State of Iowa. MCNA, on the other hand, is required to comply with the relevant IAC and State Contract. Pursuant to the State Contract, MCNA is required to include dental providers in

its network only to the extent that such provider is necessary to maintain adequate network sufficiency to meet the needs of enrollees, but not beyond that point. Appendix v. II, pp. 222-223. Consequently, the District Court erred in ruling that 249N required MCNA to include Colwell in its network of dental providers. This Court should, properly, reverse that ruling.

III. MCNA's network of general dentists in Colwell's area meets sufficiency standards, thereby permitting removal of Colwell from the network.

The competent evidence established that MCNA has a sufficient network of general dentists in the region where Colwell practices. While Colwell insinuates otherwise, there is no competent evidence to refute the numbers. Consequently, this Court should reverse the District Court and find that MCNA's network of general providers in and around Pottawattamie County is sufficient.

MCNA is required to maintain a provider network to deliver services sufficient to meet the needs of its enrollees.

Appendix v. II, pp. 222-223. Despite the attempt to elevate his credentials, (Appellee Brief, pp. 12-13), Colwell is a general dentist located in Council Bluffs, Pottawattamie County, Iowa, who is performing services under his general dentist license. Appendix v. I, pp. 273 (Tr. 5:15-17), 305-306 (Tr. 68:24-69:1), 391 (Tr. 231:10-24); Appendix v. III, p. 11. Therefore, the only relevant evidence pertains to general dentists in MCNA's network located in the Pottawattamie County area, which Colwell failed to present.

Significant evidence was received at trial establishing that MCNA's general dentist network in Pottawattamie County is sufficient, with or without Colwell's participation. Appendix v. III, p. 14; Appendix v. II, pp. 399, 406, 516, 532-535, 564; Appendix v. I, pp. 353 (Tr. 178:24-25), 365 (Tr. 202:4-7), 388-389 (Tr. 228:17-229:18), 390-391 (Tr. 230:24-231:15). Additionally, Colwell admits that MCNA's network in Pottawattamie and surrounding counties is comprised of over fifty general dentists. (Appellee Brief, p. 22). Finally, the External

Quality Review Report (June 2019) audit concluded that "MCNA's provider network has the capacity to meet the needs of respective Medicaid member populations for general dentists...." Appendix v. II, p. 534. This is not simply drawing a different conclusion from the evidence as Colwell suggests. (Appellee Brief, p. 43). This is the conclusion as to the adequacy of MCNA's network.

In an attempt to insinuate insufficiency of the network, Colwell misstates the interplay of network adequacy and "medical loss ratio" clawback by claiming Iowa required MCNA to somehow bolster its network. Quite to the contrary, MCNA proposed to retain some of the clawback funds based not on network adequacy, but on the "medical loss ratio", in exchange for utilizing the funds toward network development. Appendix v. I, pp. 386-387 (Tr. 226:12-227:18), 387-389 (Tr. 227:22-229:7); Appendix v. II, p. 387. This again compares apples to oranges.

Colwell presented no evidence showing a lack of general dentists, and he presented no evidence that

targets the Pottawattamie County area, instead relying on a compilation of general grievances. Appendix v. II, pp. 608-622. This left the relevant testimony and tailored evidence, all of which was offered by MCNA, uncontested. The evidence clearly shows that MCNA's network is sufficient to meet beneficiary needs, regardless of Colwell's participation. This Court should therefore reverse and rule that MCNA's network of general dentists in and around Pottawattamie County, Iowa, is sufficient, with or without Colwell.

IV. The contract between the State of Iowa and MCNA permits nonrenewal of Colwell's Provider Contract.

The State Contract between MCNA and the State of Iowa does not prohibit MCNA from issuing Colwell a notice of nonrenewal. Colwell's brief recites the scant evidence presented, which fails to establish that Colwell fell into any of the protected categories or indicate that MCNA had violated any of these terms. Lacking virtually any competent evidence, this Court should reverse the finding

that MCNA was precluded from removing Colwell based on State Contract terms.

It goes without saying that Colwell filed claims for payment, appealed for patients and engaged in other activity that a typical dentist would undertake. (Appellee Brief, pp. 63-64). That is not in dispute, and it misses the mark.

Colwell claims to have been discriminated against because of his general dentistry license, because he claimed to serve a high-risk population, provided unusually costly treatment and because he advocated for patients. (Appellee Brief, pp. 61-64). First, the evidence is nearly nonexistent that he fell within any of these categories to trigger their respective operation, except for holding a general dental license. Second, and even more glaring, he presented no evidence that the notice of nonrenewal was linked in any way to these terms. In short, he wants to claim discrimination, but eschews the burden of establishing any discriminatory action or

presenting evidence of discrimination. (Appellee Brief, p. 64).

By claiming that there was no justification provided to Colwell in the nonrenewal letter, his brief misapprehends the circumstances. (Appellee Brief, p. 18). MCNA did not terminate Colwell "for cause", but rather elected not to renew him at the end of the contract term. There is no requirement in the State Contract (Appendix v. II, pp. 194-375) or his Provider Contract (Appendix v. II, pp. 8-24), that requires MCNA to provide Colwell with a reason for nonrenewal. This is a manufactured strawman argument.

Without any supporting evidence, Colwell argues that MCNA is attempting to save on payment for treatment to beneficiaries. (Appellee Brief, p. 43-44). However, logically, to avoid payment for services, MCNA would have to remove beneficiaries, not a duplicative provider. He did not, nor could not, present evidence that MCNA was eliminating Medicaid beneficiaries, as his argument would

require. This is, again, more strawman argument, lacking merit.

Colwell vacillates between arguing that he was discriminated against because he was a dentist, because he sought expedited review, because he was an advocate or possibly because he sought payment for services. Although he argues multiple untethered grounds, Colwell presented nearly no evidence that he actually fell within the terms asserted under Section E.2, E.3 and/or E.4 of the State Contract. Appendix v. II, pp. 223-224. Even if he could trigger any one or more of these provisions, Colwell completely failed to present any evidence to link the nonrenewal to any of these terms. Consequently, there is no evidence to support the District Court's ruling, and this Court should reverse that portion of the Order that finds sections E.2, E.3 and/or E.4 of the State Contract preclude Colwell's nonrenewal.

V. The Provider Contract permits MCNA to elect not to renew Colwell's contract at the conclusion of the term.

The Provider Contract contemplates nonrenewal as well as termination. In concluding the opposite, the District Court and Colwell ignore the language of the Provider Contract, and invite this Court to do the same. This Court should reject such an offer, and find that the plain language of the Provider Contract at issue permits nonrenewal.

Colwell focuses exclusively on Article X, "Term and Termination," to argue that nonrenewal is not contemplated by the Provider Contract. (Appellee Brief, p. 24, 27). However, under Article III, "Provider Obligations", Colwell agreed not to disparage "MCNA in any manner during the term of this Agreement or in connection with any expiration, **termination or non-renewal of this Agreement**." Appendix v. II, p. 13. This term contemplates expiration of the termination as provided in Article X. Appendix v. II, p. 19. It also clearly contemplates non-disparagement in the event of a nonrenewal of the Agreement. Clearly, these are different

terms and grounds on which the Provider Contract can end.

This language from Article III clarifies and provides further support that Article X permits nonrenewal under subsection (1) at the conclusion of a term. Appendix v. II, p. 19. This would uphold the purpose of, and very reason for including, a limited term in Article X(1) in the first place.

In light of the foregoing, Colwell's argument that "termination" under Article X(2) is the only means to end the Provider Contract is an unreasonable interpretation of the agreement. (Appellee Brief, p. 27). First, this renders Article X(1) meaningless and eliminates any need for a contract term. Second, it renders the reference to nonrenewal in Article III(12) completely meaningless. In order to give effect to each term of the Provider Contract, and to uphold the goal of managed care, this Court should rule that the Provider Contract automatically renews for successive one-year terms, unless a party opts to not renew for another term under Article X(1).

In this case, MCNA exercised that option and provided Colwell with notice of nonrenewal. It did so after years of struggles with Colwell, which required an unnaturally large amount of staff time that was not rectified with additional training. Appendix v. I, pp. 303 (Tr. 56:7-11), 355 (Tr. 190:2-7), 357 (Tr. 192:12-23), 368 (Tr. 205:3-8). Nonrenewal at the conclusion of a term is permitted by the Provider Contract, without the necessary grounds required for a termination of an executory agreement.

VI. MCNA's notice of nonrenewal of Colwell's Provider Contract was valid, and not a breach of the Provider Agreement.

Based on the foregoing, the notice of nonrenewal provided by MCNA to Colwell was not prohibited by federal or state law, and it did not constitute a breach of the State Contract or Provider Contract. Argument in reply is not necessary because Colwell presents no additional argument in this regard in his Appellee Brief.

CONCLUSION

As argued in MCNA's Briefs, this Court should respectfully reverse the February 17, 2020, order of the District Court, rule consistent with the arguments presented by MCNA and rule that MCNA validly provided Colwell with nonrenewal of his Provider Contract.

ATTORNEY'S COST CERTIFICATE

I certify that the true cost of producing the necessary copies of the foregoing Final Reply Brief only was $0.00, due to electronic filing, and that amount is to be charged to the Defendants-Appellants.

/s/ Rodney C. Dahlquist, Jr.
Rodney C. Dahlquist, Jr., *pro hac vice*
Anne M. Breitkreutz, AT0001103

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CERTIFICATE OF SERVICE AND FILING

The undersigned hereby certifies that on August 27, 2020, I electronically filed the foregoing with the Clerk of the Supreme Court by using the EDMS system, which will provide notice of this filing to the attorneys of record.

/s/ Rodney C. Dahlquist, Jr.